

ORIGINAL

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May 13 2010

IN THE SUPREME COURT OF THE STATE OF MONTANA

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

No. DA 10-0055

SCOTT P. HEDDINGS,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

REPLY BRIEF OF APPELLANT

Appeal from Case # CDV-09-093,
Petition for Postconviction Relief,
Cascade County District Court,
Judge Kenneth Neill

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
REBUTAL OF ARGUMENTS	1
A. THE DISTRICT COURT'S ORDER	1
B. DISCUSSION	1
CONCLUSION	4
NOTICE	4
CERTIFICATE OF SERVICE	5
CERTIFICATE OF COMPLIANCE	5

TABLE OF AUTHORITIES

State v. Anderson, 1998 MT 258, 291 Mont. 242, 967 P.2d 413	2,3
State v. Neufeld, 2009 MT 235, 351 Mont. 389, 212 P.2d 1063	1,2
Witte v. U.S., 515 U.S. 389 (1995)	2,3

OTHER AUTHORITIES

Montana Code Annotated, § 46-11-504	2,3
Montana Consitution	2
United States Consitution, Amendment V	1-3

REBUTAL ARGUMENTS

A. The District Court's Order

The State mentions that the District Court noted that the Petitioner relied upon Justice Rice's concurring opinion and that the District Court stated that that language was not controlling. If, as Justice Rice points out, there is an error in this Court's reasoning in the majority opinion, then this case should be ripe for review and argument.

If in fact the concurring opinion is not controlling, it most definitely could have been used by the District Court in making an informed decision on those facts that Justice Rice pointed out. That matter will be for this Court to decide.

B. Discussion

The State claims that Petitioner's brief is mainly focused on the Neufeld case. However, Petitioner's claims and arguments in the District Court Postconviction Relief, as well as this appeal, primarily raise as listed claims of the Fifth Amendment Double Jeopardy violation. Arguments and case law were presented in the initial brief to support this claim, and this appeal should be reviewed with the scrutiny of the protections of the U.S. Constitution as well as the prior decisions of this Court.

The State correctly points out on page 7 of its brief that "In Neufeld, this Court determined that the State of Montana sought to punish the defendant for the same sexual contact that had been previously punished in federal court."

In Neufeld, Justice Rice correctly pointed out that the majority opinion improperly concluded that the federal charge was for the same sexual contact(intercourse), as the federal statute

does not "necessarily include" sexual intercourse. If this Court uses the same analysis as it did in Neufeld when comparing the charging documents of the State and Federal cases, it should come to the same conclusion, which is that it was the admitted sexual activity with a minor in the Federal sentencing proceeding which imposed the punishment for that conduct, thereby triggering the protections of the Fifth Amendment and M.C.A. 46-11-504.

It is a foundational principle of our country, that the earliest Courts of the land have decided, that the protections from multiple punishment for the same crimes can not be allowed.

This Court in its decision of Neufeld has proven that fact. Though the cases may not be precisely the same, the similarities warrant this Court to examine the facts in comparison with Neufeld, using the same rationale and reasoning in coming to the conclusion that it is the punishment for the same conduct in another venue that is the basis for a State charge, is prohibited by the Fifth Amendment, the Montana Constitution, Montana Statute, and this Courts own precedent.

The State contends that Witte and Anderson are controlling in this case, and that Neufeld remains the law in Montana. The Petitioner contends that Witte and Anderson can not be applied in the present case, as they are distinguished by the jurisdictional arena that they were challenged in and the statutory considerations of each one. Neither of those two cases have the same jurisdictional elements that the Petitioner and Neufeld cases have. The Supreme Court doed not make Witte binding upon this Court, but it is a controlling case for other similarly situated federal cases.

It should be noted as well that the Witte Court majority recognized that the provisions of the U.S. Sentencing Guidelines would reduce the likelihood of a second punishment. (Witte pg.20) Reliance on Witte in this case would be misplaced, as the Supreme Court itself has said that the double jeopardy concerns are reduced by the provisions of the U.S. Sentencing Guidelines, provisions that are not available to the Petitioner/Appellant in this case. Witte does not afford the Petitioner the same protections against multiple punishment for the same conduct that the U.S.S.G. does.

Though M.C.A. 46-11-504 provides some protections against multiple punishments for the same offense, it is not all encompassing and it may not contemplate the facts of the instant case, that may still allow the Petitioner to be punished twice.

The Double Jeopardy Clause is still offended by the State of Montana's action.

The State next argues that the IAC claims must establish that there is/was some arguable merit to a motion that was not filed by defense counsel. Petitioner contends that had counsel prepared and presented a professionally prepared and researched brief on the issue, that the merits of the argument would have been sufficiently presented to the Court to establish and back the claim of Double Jeopardy and violation of Montana Statute, even in light of the prior case of Anderson, given the uniqueness of the present case.

It can not be said now that counsel would not have presented sufficient arguments to counter the Courts rationale under Anderson, as Petitioner contends that Anderson would not have definitely applied anyway.

This position establishes the reasonable probability that the results of the proceedings would have been different had counsel filed such a motion. Therefore, the IAC claim has merit.

CONCLUSION

The District Court's analysis of Anderson and Witte are incorrect and do not apply to Petitioner/Appellant's case.

Petitioner/Appellant's counsel was ineffective by not making motion for dismissal on double jeopardy grounds, as there was significant merit to the claim.

The District Court's order denying the Appellant's petition for postconviction relief should be reversed and ordered to have the conviction reversed, charge dismissed with prejudice on double jeopardy grounds and ineffective assistance of counsel.

NOTICE

Petitioner/Appellant requests this Court to appoint counsel for preparation and representation at any oral argument hearings that this Court may set.

Respectfully submitted this 10th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Reply Brief of Appellant to be mailed to:

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DATED 5-10-10 BY: Scott P. Heddings
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief has been prepared using monospaced typeface, a 10 CPI font, and is within the 10,000 word count limit.

BY: Scott P. Heddings
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